IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24/03/2004

CORAM

THE HON'BLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.199 of 1993

1. Narayanaswami Naidu
2. Anusuya Nathan .. Appellants

-Vs-

1. Govindaraju Naidu (died)
2. G.Damotharasamy
3. G.Venugopal
(RR2 and 3 are brought on record
as LRs of the deceased 1st
respondent as per order of Court
in the Memo, dt.24-3-2004) .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree made in A.S.No.98 of 1991 dated 20.1.1992 by the III Additional Subordinate Judge, Coimbatore, reversing the judgment and decree made in O.S.No.1467/85 dated 27.3.199 1 by the II Additional District Munsif, Coimbatore.

!For Appellant : Mr.V.Venkatasamy

^For Respondents : Mr.S.M.Loganathan

:JUDGMENT

This second appeal has arisen from the judgment of the learned III Additional Subordinate Judge, Coimbatore, made in A.S.No.98/91 wherein the judgment of the trial Court in a suit for permanent injunction granting the relief in favour of the plaintiffs, was reversed.
2. The plaintiffs sought for the relief of permanent injunction that their peaceful possession and enjoyment of the plaint Schedule mentioned property, a cattle shed, should not be disturbed or interfered with either by trespass or by otherwise by the defendants with the following pleadings: The first plaintiff and the first defendant are brothers. The properties were divided between them by way of a partition deed dated 23.6 .1968. The building and the space adjoining the same, situated on the north of Perumal Koil Street, Pappanaickenpalayam were also partitioned. A specific portion measuring 38 +' east west on the north, 40' on the south and 98' north south on the east and 97' on the west consisting of five anganam house with front azaram, a 3 anganam tited shed on the south and a tiled cowshed were

allotted to the first defendant, while a specific portion measuring 50 feet east west on the north, 52' on the south, 98 feet north south on the west and 96 +' on the east consisting of 5 anganam house and a 7 anganam tiled house on the south were allotted to the first plaintiff. The first plaintiff's properties are situated on the east of the first defendant's property. The first defendant took possession of his portion, remodelled the same, demolished the cattle-shed and put up residential portions. At that time, he sought for the permission of the first plaintiff to tie his cattle in the first plaintiff's portion. Accordingly the first plaintiff permitted him to have his cattle in his portion and to use his latrine as a matter of leave and licence. The first plaintiff decided to give his portion namely the suit property, to his daughter, the second plaintiff. Hence, the first plaintiff requested the first defendant to make his own arrangements and not to leave his cattle in his portion. The suit property was settled in favour of the second plaintiff. The licence granted to the first defendant has already been revoked and no more in force. The defendants were attempting to interfere with the plaintiffs' peaceful possession and enjoyment of the suit property, which necessitated them to file the suit.

3. The suit was resisted by the defendants with the following allegations:

Though the first plaintiff was allotted the eastern portion to a particular north south length, the dividing line between the two properties was not straight. The first plaintiff took the eastern property to a certain north south length along with the protruding structure on the west, and the first defendant was allotted western portion along with south eastern area where the cattle shed was situated. The cattle shed was mentioned in the property allotted to the first defendant under the partition. There was only one cattle shed all along. The description of property set out in the plaint does not contain correct particulars. No demolition or reconstruction was made by the first defendant. Only a flush-out latrine was constructed. The allegation that the first defendant was allowed to remain in possession of the cattle shed under leave and licence is false and imaginary. The cattle shed portion along with vacant space and flush out latrine portions were in the possession of the first defendant from the time of partition. The plaintiffs have no right over the same. Mere suit for injunction without seeking declaration of his right and when the first plaintiff is not in possession, is not maintainable. The first defendant has been in possession of the cattle shed and adjacent portion in his own right, and hence, he perfected title to the said portion by adverse possession for over 22 years. The plaintiffs cannot oust him. Hence, the suit was to be dismissed.

4. The trial Court framed the necessary issues, tried the suit and decreed the same as prayed for. Aggrieved, the defendants took it on appeal, wherein the judgment of the trial Court was set aside by a judgment of reversal, and the suit was dismissed by the first appellate Court. The aggrieved plaintiffs have brought forth this second appeal.

5. At the time of admission, the following substantial question of law was formulated by this Court:

"Whether the lower appellate Court was right in the view it took that the suit, as framed, is not maintainable?"

6. This Court heard the learned Counsel for the appellants and also the learned Counsel for the respondents on those contentions.

7. On careful consideration of the rival submissions and scrutiny of the materials available, this Court is of the considered view that this appeal requires an order of dismissal by this Court.

8. The appellants before this Court filed the instant suit seeking a permanent injunction in respect of the property shown as a cattle shed. Admittedly, the immovable properties, which belonged to the first plaintiff and the first defendant, were divided by way of a registered partition deed marked as Ex.A1 dated 23.6.1968, wherein the eastern part of the property was allotted to the first plaintiff, while the western part was allotted to the first defendant. It is also not in controversy that the partition was equal, and the parties were also put in possession of their respective shares. The western part is in Survey No.582, while the eastern part is in Survey No.583. The specific case of the plaintiffs before the trial Court was that the plaint Schedule mentioned cattle shed was actually situated within the property of the plaintiffs; that there was another cattle shed in the portion of the property allotted to the first defendant; that he demolished the same and put up residential quarters; that considering the relationship, the first plaintiff permitted him to tie his cattle in the first plaintiff's cattle shed; that it was only a permission granted, and subsequently, the same was revoked; that taking advantage of the user of the same, the defendants desired to grab the property; that they attempted to encroach upon the property, and hence, there arose a necessity for filing the suit for permanent injunction. The defence plea was that there was only one cattle shed, which was allotted to the first defendant in the partition, and he was enjoying the same; that there was no cattle shed either allotted to or enjoyed by the first plaintiff at any point of time, and thus, it was only a false claim; that even without asking for a declaration, the plaintiffs have come forward with the relief of permanent injunction, and hence, it was to be rejected.

9. This Court is unable to agree with the case of the plaintiffs for more reasons than one. Admittedly, the properties were divided between the brothers namely the first plaintiff and the first defendant. It is not the case of the plaintiffs that there was an unequal partition. But, the partition was equal, and the parties were also put in possession of the respective shares, and they have been enjoying the same till this time, and thus, Ex.A1 partition deed was actually accepted and acted upon. Ex.A1 partition deed speaks of only one cattle shed, and that was allotted to the first defendant. It does not make mention of another cattle shed or the allotment of the same to the first plaintiff. Having accepted the partition deed under Ex.A1 and having put forth a case that the properties were partitioned; that the parties were put in possession of the respective shares; and that they have been enjoying so, the plaintiffs cannot now be permitted to say that there was another cattle shed; that the same was allotted to the first plaintiff, and he has been enjoying the same. Even from the plaint averments, it would be clear that the first defendant has been tying his cattle in the shed what is available. The case of the plaintiffs in that regard was that only one cattle shed what was available, was allotted to the first plaintiff, and it was in existence all along; that the cattle shed allotted to the first defendant was demolished, and then, the first plaintiff considering the relationship, permitted the first defendant to tie his cattle in his cattle shed what is now available. This cannot be accepted for the simple reason that there was only one cattle shed, and the same was allotted

to the first defendant under the partition as evidenced by Ex.A1. In such circumstances, it would be very difficult to accept the case of the plaintiffs stating that there were two cattle sheds, one allotted to the first defendant and another to the first plaintiff; that the cattle shed allotted to the first defendant, was demolished and constructions were raised therein. From Ex.A4 a letter issued by the Insurance Company, it could be seen that the first plaintiff sought for some compensation on the death of his cows. The first appellate Court has pointed out that the address shown in Ex.A4, was that of the first defendant and not that of the plaintiffs. This would also be indicative of the fact that there was no cattle shed, as contended by the plaintiffs, in their property.

10. Apart from the above, the plaintiffs have not shown that they were in possession, much less lawful possession of the property in question, which alone would entitle them for getting a permanent injunction as one asked for in the instant case. Thus, the plaintiffs have failed to prove not only their title, but also the lawful possession presente at the time of the filing of the suit. The first appellate Court was perfectly correct in dismissing the suit, and hence, this Court is unable to notice any reason to interfere in the judgment of the first appellate Court.

11. In the result, this second appeal is dismissed, confirming the judgment and decree of the first appellate Court and leaving the parties to bear their costs.

Index: yes
Internet: yes

To:

1. The III Additional Subordinate Judge
Coimbatore
2. The II Additional District Munsif
Coimbatore
3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/

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